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Reasons for decision

Derrick J. Dunne,

complainant,

and

Canadian Council of Teamsters, Local 938,

respondent,

and

Purolator Inc.,

employer.

Board File: 30148-C

Neutral Citation: 2013 CIRB 705

December 17, 2013

The Canada Industrial Relations Board (the Board), composed of Ms. Judith MacPherson, Q.C., Vice-Chairperson, and Messrs. Richard Brabander and Daniel Charbonneau, Members, considered the above-noted matter.

Parties' Representatives of Record

Mr. Derrick J. Dunne, for himself;

Mr. Robert Bouvier, for the Canadian Council of Teamsters, Local 938;

Ms. Marsha M. Lindsay, for Purolator Inc.

These reasons for decision were written by Ms. Judith MacPherson, Q.C., Vice-Chairperson.

I. Nature of the Complaint

[1] On September 20, 2013, Mr. Derrick J. Dunne (the complainant) filed a complaint under section 97(1) of the *Canada Labour Code (Part I – Industrial Relations)* (the *Code*), alleging that his union, the Canadian Council of Teamsters, Local 938 (the union), violated its duty of fair representation (DFR), pursuant to section 37 of the *Code*, by failing to file a grievance on his behalf regarding his termination of employment.

II. Background and Facts

[2] The complainant commenced employment with Purolator Inc. (the employer or Purolator) in June 2000. In a January 22, 2013 meeting with the employer and a union representative, Mr. Gary Lavee, the complainant received a letter from Purolator informing him that his employment had been terminated. Following the meeting, the complainant discussed the matter with Mr. Lavee and presumed that he would be undertaking an investigation into his termination and filing a grievance on his behalf.

[3] After several subsequent attempts to contact Mr. Lavee had failed, the complainant received his Record of Employment from Purolator. It stated that a grievance was pending.

[4] The complainant then received his vacation pay from Purolator. It was at that point that he realized the union had never filed a grievance. He then contacted the union and was told that a grievance form had never been signed and that the time in which to do so had expired.

[5] The union's business agent, Mr. Shahan Simon, advised the complainant that, regardless of the situation, he would ask for a meeting with the employer. The employer declined to meet.

[6] In his complaint, the complainant indicated that May 19, 2013 was the date on which he knew of the union's action or the circumstances giving rise to his complaint. He acknowledged that his complaint was filed beyond the 90-day time limit provided for in section 97(2) of the *Code*, but requested that the Board extend the time limit on the basis that he "was not aware of [the] time limit".

[7] Therefore, before the Board can consider the merits of the complaint and the issue of whether the union violated the DFR it owed to the complainant, the Board must determine, as a preliminary issue, whether it will exercise its discretion under section 16(m.1) of the *Code* to extend the 90-day time limit for filing a complaint.

III. Analysis and Decision

[8] The complainant did not request an oral hearing. Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed the material on file, the Board is satisfied that the documentation before it is sufficient for it to decide this matter without an oral hearing.

[9] As noted, the union's DFR obligation is provided for in section 37 of the *Code*:

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[10] The DFR under the *Code* ensures that a bargaining agent respects the significant rights and obligations that come with certification. A trade union cannot act in a manner that is arbitrary, discriminatory or in bad faith regarding an employee's rights under the collective agreement.

[11] In a section 37 complaint, the Board examines the union's conduct to determine whether the union acted in one of the prohibited manners in representing the complainant's rights under the collective agreement. In the instant matter, the complainant submits that the union acted in bad faith. The Board's "Section 37 Duty of Fair Representation Complaint" form sets out that a union may be acting in bad faith when it acts with an improper purpose or when its conduct or decisions are motivated by personal feelings of hostility or ill will towards the complainant.

[12] Also, section 97(2) of the *Code* provides that a complaint must be filed within 90 days after the date when a complainant knew, or ought to have known, of the action or circumstances giving rise to the complaint:

97.(2) Subject to subsections (4) and (5), a complaint pursuant to subsection (1) must be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

[13] The 90-day mandatory time limit serves to provide finality and certainty, which is important in establishing and maintaining constructive labour-management relations. It also allows for potential disputes to be settled in a timely manner so as to ensure effective industrial relations in the workplace (see *McRae.Jackson*, 2004 CIRB 290).

[14] The Board's case law clearly establishes that the 90-day time limit begins to run when the complainant first has knowledge of the facts, actions or omissions giving rise to the complaint (see *Blakely*, 2003 CIRB 241). In the present matter, the complainant states that he knew of the union's actions or the circumstances giving rise to his complaint on May 19, 2013.

[15] The Board accepts the complainant's statement that May 19, 2013 was the date on which he knew of the union's action or the circumstances giving rise to his complaint. The Board therefore concludes that May 19, 2013 constitutes the date on which the 90-day time limit from section 97(2) of the *Code* commences. This DFR complaint was not filed with the Board until September 20, 2013, more than four months after the complainant knew, or ought to have known, of the union's conduct that gave rise to the complaint and, more specifically, over a month beyond the 90-day time limit set out in the *Code*. Consequently, the complaint was filed in an untimely manner.

[16] As the complaint form also indicates, although, section 16(*m.1*) of the *Code* allows the Board to extend the 90-day time limit for filing a complaint, it will only do so in exceptional circumstances. In other words, the Board exercises its discretion to grant an extension of the time limit only where compelling reasons have been established, such as those that were beyond the complainant's control. An example would be where the complainant was ill to such a degree that it prevented him or her from filing a timely complaint (see *Thibeault*, 2010 CIRB 505).

[17] As the Board explained in *McRae.Jackson*, *supra*:

[52] If a complaint is filed outside the 90-day period, the complainant must provide compelling reasons as to why his or her application should be considered nonetheless. The Board assesses the reasonableness of the delay in filing a complaint on a case-by-case basis. ...

[18] As the Board explained in *Torres*, 2010 CIRB 526:

[19] The Board will not automatically relieve a party from compliance with the 90-day time limit for the filing of an unfair labour practice complaint. The Legislator has always emphasized that labour relations matters must be brought to the Board forthwith. Potential respondents are entitled to know whether they need to preserve evidence and otherwise prepare for a complaint under the *Code*.

[19] The Board's strict enforcement of the 90-day time limit and exercise of its discretion to extend the time limits only in exceptional circumstances has been upheld by the Federal Court of Appeal (see *Buenaventura Jr. v. Telecommunications Workers Union*, 2012 FCA 69; and *Hudgins v. Canada (Attorney General)*, 2012 FCA 185).

[20] The onus is therefore on the complainant to provide a compelling reason to establish that he was unable to file the complaint within the time limits set out in the *Code* (see *Blakely*, *supra*). The Board's complaint form specifically indicates that a complainant who seeks to have the time limit extended must explain the exceptional circumstances that he or she feels the Board should consider when it decides whether or not to exercise its discretion in this regard.

[21] In this matter, the exceptional reason given by the complainant as to why he filed the complaint in an untimely manner was because he "was not aware of time limit."

[22] The Board does not consider lack of knowledge of the provisions of the *Code* to be "compelling" circumstances beyond the complainant's control. As explained in *Galarneau*, 2003 CIRB 239, oversight or negligence on the part of the complainant is not considered to be a reason beyond the complainant's control:

[29] Generally, the Board will only extend time limits where the delay was beyond a complainant's control. This might include, for example, a situation where a complainant was ill to such a degree that he was prevented from filing the complaint on time. Oversight or negligence on the part of a complainant will not be regarded as beyond his control (see *Gary T. Sayle*, July 4, 2002 (CIRB LD 674)); neither will seeking an alternative avenue of redress.

[23] Moreover, the fact that the complainant may be considered as a layperson who is self-represented before the Board is also not sufficient to warrant an extension. The time limits apply equally to all parties. This was expressed in *Torres, supra*, as follows:

[20] While it may appear unfair that laypeople need to act quickly in bringing labour relations complaints forward, section 97(2) applies equally to trade unions and employers.

[21] The Board will not exercise its discretion under section 16(m.1) so as to render illusory the Legislator's intent to oblige parties to file their labour relations complaints expeditiously.

[24] In the present matter, the Board finds that the complainant has not presented any compelling reasons to explain the untimely filing of his complaint that would convince the Board to exercise its discretion to extend the time limit pursuant to section 16(m.1) of the *Code*.

[25] Accordingly, the Board will not grant an extension of the time limit set out in section 97(2) of the *Code* for the filing of the complaint. Therefore, it must dismiss the complaint on the basis of being filed in an untimely manner.

[26] For the reasons provided above, the complaint is dismissed.

Judith MacPherson, Q.C.
Vice-Chairperson

Richard Brabander
Member

Daniel Charbonneau
Member